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No. 1323

In the Supreme Court of the United States

OCTOBER TERM, 1967

HOWARD WALLACE BARBEE AND BOBBY JOE MANZIEL,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 12–28) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 1968. A petition for rehearing was denied on March 19, 1968. The petition for a writ of certiorari was filed on April 15, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

306-185—68

QUESTION PRESENTED

Whether the evidence established an offense under 18 U.S.C. 472.

STATUTE INVOLVED

18 U.S.C. 472 provides:

> Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Texas, petitioners were convicted of having willfully, knowingly and with intent to defraud kept in their possession altered obligations and securities of the United States (18 U.S.C. 472) and conspiracy to commit that offense (R. I, 58–70, 240; R. III, 1167).[1] Each petitioner was sentenced to concurrent terms of imprisonment for four years on each count; execution of the sentences was suspended and petitioners were placed on probation for five years (R. III, 1179–1180). The court of appeals affirmed (Pet. App. 12).

The evidence at trial showed that early in February of 1965 petitioner Barbee displayed to one

[1] The offenses were charged in a six-count indictment, count one being the conspiracy count and counts two through six being substantive counts. Petitioner Barbee was convicted on counts 1, 4 and 6. Petitioner Manziel was convicted on counts 1 and 5.

Whitaker, a Texas businessman, four genuine federal reserve notes—two fives and two fifties—the serial numbers and other markings of which had been altered to make it appear that each of the fives and each of the fifties were identical in every detail (R. II, 572–575, 630–634, 654; R. III, 891, 955, 977, 990). The purpose was to convince Whitaker that one of each of the respective denominations was not genuine but a duplicate which could be reproduced on bleached one-dollar bills by a secret process (R. II, 582, 641–642, 684–706, 711–713). Petitioner Barbee explained that $40,000 worth of these so-called reproduced federal reserve notes could be purchased for $10,000 (R. II, 575–577; R. III, 878) and that he and petitioner Manziel wanted Whitaker to come in for one-third because they could not raise all the money (R. II, 575–577). Whitaker indicated an interest in the deal and returned the four notes to Barbee (R. II, 577–579). Whitaker called the local sheriff's office concerning the matter (R. II, 578–579).

A few days later, Whitaker met both petitioners at Manziel's wrecking yard, where they again discussed the deal and the process by which the notes were "reproduced" (R. II, 579–582). By prior arrangement, the contact man who was to supply the bills telephoned and talked to petitioner Manziel, who informed Whitaker that the exchange would have to be made in Mexico (R. II, 583).[2] After petitioners reas-

[2] The contact man was co-defendant Curtis Dukes (who pleaded guilty to count 1 prior to trial). He had been a party to a similar type of scheme previously used to defraud Barbee and Manziel out of some $6,000 (R. II, 758–768).

sured Whitaker of the safety of a Mexican exchange, the good quality of the reproduced notes and their intent to proceed with the deal, Whitaker left with the four altered notes, ostensibly to show them to a friend in order to raise the money (R. II, 585–589).

That evening Whitaker showed the altered notes to Secret Service Agents (R. II, 591–593, 627–634). The following day one of the agents, posing as a prospective investor in the deal, met with Whitaker and petitioner Barbee at Whitaker's store. The agent examined the bills in Barbee's presence and discussed the reproduction process with him (R. II, 593–594, 635–637, 596–601, 638–644). It was agreed that the agent could make the exchange at the Mexican border (R. II, 645).

The altered notes were returned to petitioner Barbee. He was arrested shortly thereafter as he started to leave (R. II, 601–602, 644–648). Petitioner Manziel was arrested at his wrecking yard (R. II, 648–650). In fact, there was no secret process to make duplicate reserve notes. The scheme contemplated absconding with the victim's money at the time the exchange was supposed to take place (R. II, 697–699, 702–705; R. III, 885–886).[3]

[3] To prove fraudulent intent, the government showed that petitioners had been defrauded out of some $6,000 several years earlier in an identical scheme (R. II, 684–706, 759) and intended to get their money back the same way they had lost it (R. II, 708–709).

ARGUMENT

Petitioners contend that possession and use of a genuine federal reserve note to swindle another, even though the note is materially altered specifically for that purpose, is not an offense under 18 U.S.C. 472 (Pet. 6–11). The statute, however, unambiguously applies to any person who, with intent to defraud, "keeps in [his] possession * * * any * * * altered obligation or other security of the United States * * *." Petitioners' possession of the altered notes, with knowledge of the alteration and with intent to rely on the alteration to defraud another, brought them within the purview of the statute. *Foster* v. *United States,* 76 F. 2d 183 (C.A. 10); *Crouch* v. *United States,* 298 Fed. 437 (C.A. 6); see *Errington* v. *Hudspeth,* 110 F. 2d 384, 386 (C.A. 10), certiorari denied, 310 U.S. 638.

Relying on legislative history, petitioners assert that "intent to defraud" as used in the statute is synonymous with "intent to utter, publish, or sell." While, as petitioners indicate, Section 10 of the June 30, 1864 statute (13 Stat. 218, 221) did require both an "intent to utter, publish, or sell" and an "intent to deceive or defraud" for a conviction for possession of counterfeit or altered obligations, subsequent revision (Revised Statutes Section 5431) and judicial interpretation (*e.g. United States* v. *Provenzano,* 171 Fed. 675 (C.C.S.D.N.Y.)) eliminated the necessity for an intent to pass the notes but retained the "intent to defraud". That intent included, but was not limited to, the intent to pass, utter, or sell. Congress eliminated any possibility of ambiguous construction in the 1948

codification (18 U.S.C. 472) by deleting all reference to an intent to utter, publish or sell. Thus, under the present statute, the only type of intent required to commit the offense is unambiguously delineated as the general intent to defraud. See *McKinney* v. *United States,* 172 F. 2d 781, 782–783 (C.A. 9); *Crouch* v. *United States,* 298 Fed. 437 (C.A. 6); *United States* v. *Provenzano,* 171 Fed. 675 (C.C.S.D.N.Y.). It has long been settled that the "intent to defraud" is not limited to an intent directed against the United States, but broadly covers an intent directed at third persons, both known and unknown. See, *e.g., Riggs* v. *United States,* 280 F. 2d 750 (C.A. 5); *United States* v. *Rabinowitz,* 176 F. 2d 732 (C.A. 2), reversed on other grounds, 339 U.S. 56; *McKinney* v. *United States,* 172 F. 2d 781 (C.A. 9); *Foster* v. *United States,* 76 F. 2d 183 (C.A. 10).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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